MAYBANK FINANCE BHD

v.

SHARP TRILLION (M) SDN BHD & ORS

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[CIVIL SUIT NO: 22-85, 86, 87 & 88 OF 1997]
27 OCTOBER 1998

CIVIL PROCEDURE: *Action - Consolidation of actions - Whether a court can "deconsolidate" actions earlier ordered to be consolidated - Whether court may reverse its earlier decision - Whether court may invoke inherent powers to remedy situation - Whether court may modify earlier order - Rules of the High Court 1980, O. 4 r. 1, O. 15 r. 5, O. 92 r. 4*

CIVIL PROCEDURE: *Judgments and orders - Recalling and reopening before order perfected - Whether court may do so*

CIVIL PROCEDURE: *Reversal of decision - Order not perfected yet - Whether court may reverse decision before earlier order perfected*

CIVIL PROCEDURE: *Judgments and orders - Amendment of order - Consolidation of actions ordered inappropriately - Whether court obliged to invoke inherent powers to formulate a remedy - Rules of the High Court 1980, O. 92 r. 4*

The plaintiff had previously applied successfully to consolidate its four actions against the defendants pursuant to O.4 r. 1 of the Rules of the High Court 1980 ('the RHC') on the grounds, *inter alia*, that the parties, the issues at hand, the law and the facts were similar. Subsequently, the plaintiff discovered that the four actions did not really involve similar issues of law and facts but instead involved complicated and intricate points of law. Thus, the plaintiff applied to set aside the earlier consolidation order. At the time of this application, the said consolidation order was not perfected. The sole issue before the court was whether a court may "deconsolidate" actions which were earlier ordered to be consolidated.

Held:

[1] The consolidation of actions may be defined as the act or process of uniting several actions into one trial and judgment, by order of court where all the actions are between the same parties, pending in the same court, and involving substantially the same subject matter, issues and defences; or the court may order that one of the actions be tried, and the others

decided without trial according to the judgment in the one selected. Having granted that consolidation order, the court may make such necessary orders concerning the proceedings so as to avoid unnecessary costs or delay.

[2] After the delivery of any oral judgment, but before its perfection, a judge is permitted to recall and reopen the matter, if justice requires it, and adjudicate thenceforth. This is further justified by the fact that until that order has been perfected, it cannot be said that a final order has been drawn up. As the earlier consolidation order had not been sealed and extracted, the court was not prevented from recalling and reversing the earlier decision.

[3] Order 92 r. 4 of the RHC states that nothing in the RHC shall be deemed to limit or affect the inherent powers of the court to make an order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. In the course of utilising these inherent powers, the judge must ensure that it does not have the effect of overriding express provisions. As the RHC is silent in relation to any deconsolidation application, the inherent powers of the judge being in conflict with any explicit statutory provisions did not arise here. The court therefore was obliged to formulate a remedy to overcome the problem that had occurred pursuant to the earlier consolidation order.

[4] Powers of judges extend to the right of modifying orders when necessary. Even if an order could be construed as final (and did not permit its setting aside as it would be thereafter subject to an appeal), it does not prevent the court from modifying it. Bearing in mind that the consolidation order in the current case was yet to be perfected, by suitable use of the powers conferred under O. 15 r. 5 of the RHC, the court was not prevented from modifying the order.

[Application allowed.]

Case(s) referred to:

Harpal Singh v. Gurdial Singh [1961] 27 MLJ 321 ***(refd)***
Ho Yoke Kwei & Anor v. Ong Eng Hin [1997] 1 CLJ 647 ***(refd)***
In re Thomas Bartley v. Thomas [1911] 2 Ch 389/396 ***(refd)***
Kok Wee Kiat v. Kuala Lumpur Stock Exchange Bhd & Ors [1977] 1 MLJ 109 ***(refd)***
Lewis & Anor v. Daily Telegraph, Ltd & Anor (No 2) [1964] 1 All ER 705 ***(refd)***
Lim Yam Teck v. Lim Swee Chiang & Anor [1979] l MLJ 162 ***(refd)***
Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn Bhd Garnishee) [1990] 1 MLJ 445 ***(refd)***
Re Ropner's Settlement Trusts Ropner v. Ropner & Ors [1955] vol 1 185 ***(refd)***
Seong Fatt Sawmills Sdn Bhd v. Dunlop Malaysia Industries Sdn Bhd [1984] l MLJ 286 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 4 r. 1, O. 15 rr. 5, 17, 18, O. 18 r. 1, O. 92 r. 4

Other source(s) referred to:
Black's Law Dictionary, 6th edn, p 309

For the plaintiff - KP Ng; M/s Othman Hashim & Co
For the defendants - Michael Tan Lip Yip; M/s Tan Lip Yip & Co

Reported by Ling Hea Hoon & S Dharmendran

JUDGMENT

Suriyadi Halim Omar J:

Can a court "deconsolidate" after having granted the consolidation order much earlier? I believe so. Based on that belief I acquiesced to that application found in encl. 47 which prayed that that consolidation order be set aside. To comprehend my conclusion and explanation, I find it necessary to make reference to O. 4 r. 1 of the Rules of the High Court 1980. This pertinent provision reads:

> (1) Where two or more causes or matters are pending, then, if it appears to the Court -
>
> (a) that some common question of law or fact arises in both or all of them; or
>
> (b) that the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or
>
> (c) that for some other reason it is desirable to make an order under this rule
>
> the Court may order those causes or matters to be consolidated on such terms as it thinks just or may order them to be tried at the same time or one immediately after another or may order any of them to be stayed until after the determination of any other of them.

In brief, the consolidation of actions may be defined as the act or process of uniting several actions into one trial and judgment, by order of court where all the actions are between the same parties, pending in the same court, and involving substantially the same subject matter, issues and defences; or the court may order that one of the trial according to the judgment in the one selected (*Black's Law Dictionary* 6th edn. p. 309). Having granted that consolidation order, the court may make such necessary orders concerning the proceedings so as to avoid unnecessary costs or delay.

Before the substantive submissions of both parties commenced, I was informed that there were no explicit statutory provisions in the Rules of the High Court which permitted me to "deconsolidate" the action after granting the earlier order. I could not escape this relevant question as I was partly responsible to this unusual application, in that I was the adjudicator who had granted it. Going back in time, four cases were called up by the court on one of the "show cause days", on which day the plaintiff (applicant) confirmed that they were still interested in pursuing with the four actions. On that date neither the defendants nor their counsel were present in spite of being informed.

Alluding to O. 4 r. 1 of the Rules of the High Court 1980, learned counsel for the plaintiff (applicant) on 8 July 1998 made an application to have the actions consolidated, on grounds, *inter alia*, that the parties, the issues at hand, the law and the facts were similar. I was also informed that any order of consolidation would not prejudice the defendants, and in the process would greatly assist the court in its administration of justice. I thenceforth acquiesced to that application. As the defendants were not present on that day, the plaintiff (applicant) thus faced no opposition. Without any rebuttal evidence for consideration, apart from certain answers elicited pursuant to my probings, I did not pursue the matter further. I thereafter allowed the application. It was on that score, that I was partly responsible for the outcome of the consolidation order. Later, the plaintiff (applicant) roped in a new and much more enterprising counsel, who discovered that the matters at hand involved separate hire purchase and security documents, different breaches of contract, different claims and amount, different items, involvement of letters of credit and involvement of complicated and intricate points of law. With these diverse elements present, which may beset the court, the plaintiff (applicant) accordingly filed encl. 47 which in essence was an application to set aside my earlier consolidation order.

Before explaining my reasons for granting the "deconsolidation order", I need to stress that, eventhough the Rules of the High Court 1980 is silent on matters of this nature, or even the usage of this phrase, I find it highly effective in explaining the scenario. In its simplicity the situation is explained well. In the event the prayers of encl. 47 were allowed, technically speaking I would not be "deconsolidating" the case but merely putting parties in their original footing, after having reconsidered the matter. This would be so, as, once the order of 8 July 1998 was cast aside, *status quo* would return, thus ensuring that the four original actions would effectively be tried separately. There would be of no necessity to issue a consequential deconsolidation order.

In spite of the above clarification, for purposes of efficacy, I will continue using the phrase "deconsolidation order", as prayer (a) of encl. 47 had printed and used the word "deconsolidate". The grounds that I depended on to justify my setting aside/deconsolidation order could be split into three grounds, alternative in nature, namely that:

1. as the order had not been sealed and extracted (perfected), I was thus not prevented from recalling and reopening the matter

2. as the inherent power of the judge being in conflict with explicit statutory provisions did not arise here, on the premise none were promulgated, a judge therefore has the jurisdiction to formulate the remedies; and

3. even if the order could be construed as final, (and did not permit its setting aside as it would be thereafter subject to an appeal) it did not prevent the court from modifying it.

Recalling And Reopening The Matter Prior To The Order Being Perfected

Warrington J in the case of *In re Thomas. Bartley v. Thomas.* [1911] 2Ch 389/396, pertaining to a Master's Order which had not been passed and entered, had occasion to say:

> It is the everyday practice that, until an order is passed and entered, the matter can be brought before the Judge, and if a mistake has been made it can be put right... I think that is the correct way of dealing with the matter for the reason that, until the order is finally passed and entered, it leaves open an opportunity of reviewing and reconsidering what has been done.

A problem of similar nature was also discussed in the case of *Re Harrison's Share Under A Settlement Harrison v. Harrison & Ors. Re Ropner's Settlement Trusts. Ropner v. Ropner & Ors.* [1955] vol. 1 185. In this case an application was made to the chancery division for approval of a scheme, bearing the trust of a settlement on behalf of infants and unborn and unascertained persons. The judge in chambers allowed the application, on the premise that in a similar case, the Court of Appeal had allowed that scheme. Before the order could be perfected the decision of the Court of Appeal was reversed by the house of Lords. The judge in chambers promptly recalled this order and thereafter reversed it, and accordingly dismissed that application. For purposes of the current case, the relevant remarks applicable, is found at p. 188 where Jenkins LJ said:

> We think that an order pronounced by the judge can always be withdrawn, or altered or modified, by him until it is drawn up, passed and entered ...

In His Lordship's judgment, he had occasion to approve and endorse the remarks of Warrington J, reported in *Re Thomas (supra)* in the same page of 188 at para. F. The principles pertaining the current issue, enunciated in *Re Harrison's Settlement* and *Re Thomas* (both supra), were also thoroughly discussed and approved in the case of *Harpal Singh v. Gurdial Singh* [1961] 27 MLJ 321. In this case, the court was of even though the correctness of

the order was not in doubt when dismissing the action, the recalling and withdrawing of the order and allowing the amendment of the statement of claim was a wrong exercise of his discretion. In *Lim Yam Teck v. Lim Swee Chiang & Anor* [1979] l MLJ 162, Kulasekaram J who had initially dismissed the plaintiff's accident claim, being unhappy with the initial decision had recalled the case and heard further submissions. Having reconsidered the explanations of both parties, he reversed the earlier findings and held the defendant to be entirely at fault for the accident. This matter went up on appeal but was dismissed by the Court of Appeal, as per Civil Appeal No. 25/1977 on 10 August 1978. The last case for consideration, for purposes of this alternative ground, is the case of *Seong Fatt Sawmills Sdn Bhd v. Dunlop Malaysia Industries Sdn Bhd* [1984] l MLJ 286 where at p. 292 Abdul Hamid FJ opined:

> Counsel for the appellants submitted that a distinction can be drawn in that *Harrison's case (supra)* was an oral judgment whereas in the present case a written judgment was already delivered. Although there is this distinction as pointed out by learned counsel for the appellants, we do however think that this would (should read **would not** - mine) alter the fact that, where, as in the present, not all the quantum respecting the claims were finally assessed and at the date of the re-opening of the case no order had yet been extracted.
>
> With respect, we see no merits in the appellants' contention. We are firmly of the view that **where it is necessary and the justice of the case requires it, the Court should be at liberty to re-open the case ...** In the present case we think that the learned Judge had acted correctly when he re-opened the case with a view to perfecting the order. (emphasis mine)

Suffice if I conclude now that, after the delivery of any oral judgment, but before its perfection, a judge is permitted to recall and reopen the matter, if justice requires it, and adjudicate thenceforth. This is further justified by the fact that until that order has been perfected, it cannot be said that a final order has been drawn up. Adverting to the facts of the current case, whether by coincidence or otherwise, it was a fact that the consolidation order was yet to be extracted, sealed and served. In simple to be perfected and was never final order stage. On that considering the facts and circumstances of the case, the recalling and reversing of my earlier decision was in order.

Inherent Powers Of Court To Formulate A Remedy When Necessary

Order 92 r. 4 of the Rules of the High Court states that nothing in the Rules shall be deemed to limit or affect the inherent powers of the court to make an order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. This provision which arms the judge with an effective weapon, has never failed to be invoked by judges whenever the situation warrants it. In the course of utilising these inherent powers, the judge must

ensure that it does not have the effect of overriding express provisions. It is quite safe to say after scrutinising the rules of the High Court, that the fear of the inherent powers of the judge being in conflict with express statutory provisions, in relation to any deconsolidation application will not arise here. This is so as no express provisions have been promulgated with regard to it. The question that begs to be answered at this stage, is whether in the circumstances of the case, the court could formulate a remedy of deconsolidation when none has been provided for by parliament. Case laws are inclined towards the positive (*Ho Yoke Kwei & Anor v. Ong Eng Hin* [1997] 1 CLJ 647; [1997] 4 MLJ 292). In the case of *Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn Bhd Garnishee)* [1990] 1 MLJ 445, VC George J (as he then was) had occasion to stress that in a situation where there arises a lacuna in the face of the rules which causes a procedural injustice, in that it cannot be said that the rules contain provision making available sufficient remedies, the court not only is entitled to but obliged to make any order as may be necessary to prevent the injustice.

Therefore, in the alternative, as judges are conferred with inherent powers as provided for in the Rules of the High Court, I was obliged to formulate a remedy to overcome the problem that had occurred pursuant to the earlier consolidation order. In the circumstances of the case, so as to avoid injustice, the granting of the setting aside/deconsolidation order was in order.

Modifying A Consolidation Order

As much as O. 4 r. 1 of the Rules of the High Court provide for the consolidation of actions, the Legislature has also seen it fit to provide provisions which have the reverse effect. That pertinent provision is O. 15 r. 5, which confers power on judges to order separate trials. This provision reads:

> (1) If claims in respect of two or more causes of action are included by a plaintiff in the same action or by a defendant in a counterclaim, or if two or more plaintiffs or defendants are parties to the same action, and it appears to the Court that the joinder of causes of action or of parties, as the cause may be, may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such other order as may be expedient.

The *Supreme Court Practice 1995* vol. 1 part 1 at p. 197, had this to say regarding O. 15 r. 5 of the Rules of the Supreme Court:

> This rule enables the Court to exercise effective supervisory control over the joinder of parties and the joinder of causes of action. Rules 1 and 4, providing respectively for the joinder of causes of action and of parties, are both made subject to this rule. The rule applies where either the causes of action or the Joinder of parties or both may embarrass or delay the trial or is otherwise inconvenient.

This provision attracted the attention of the Court of Appeal in *Lewis And Another v. Daily Telegraph, Ltd. And Another (No 2)* [1964] 1 All ER 705 when a dissertation of it was held. In this case, Lewis (plaintiff) had personally taken up two actions to sue the daily telegraph. His company also took up two separate actions against *Associated Newspapers Ltd*. Later Lewis's two personal actions and his company's two actions were respectively consolidated. That meant only two sets of action were left. Later the defendants applied for the two consolidated actions to be further united into one. A dramatic turn of events occurred, and Mr. Lewis gave notice of his intention 'to deconsolidate all the four actions. As in the current case, he wanted to undo all the earlier court orders. The Court of Appeal disallowed that application as it took the view that there was really a single common question and should be heard in a single trial. Before rejecting the deconsolidation application, Pearson LJ at p. 711, had occasion to discuss the standing of an interlocutory order *vis-a-vis* that of a final order. He endorsed a passage from the *Annual Practice 1964* which read that interlocutory orders stood in the same position as final orders and could not be altered save by means of an appeal. Although the substance of the order could not be changed, the method of giving effect to it was possible. In this p. of 711, His Lordship said:

> Applying the principle to USDI the present case, I would say that the consolidation orders properly made in May, 1959, cannot now be appealed from, and cannot be set aside or cancelled. They are, however, orders having a continuing operation, being worked out or working themselves out as the action proceeds, and *if some new situation has arisen in which convenience or justice requires some modification or adaptation of the original order to fit the new situation*, the appropriate powers conferred by the Rules of the Supreme Court can be used for that purpose. (Emphasis mine)

Further down, after having considered O. 15 r. 5 read together with O. 15 r. 18 (in *pari materia* with O. 15 r. 17 of the Rules of the High Court 1980), and tying them to the consolidation order already made, his Lordship said that "by suitable use of the powers conferred, ... any order that might be convenient and desirable could be made in this case. His Lordship thereafter, only after due consideration of the pleading, pronounced the deconsolidation application, in the circumstances of the case be rejected. But what could not be ignored was the recognition that the powers of judges extended to the right of modifying orders when necessary.

Alluding to the remarks of Pearson LJ, bearing in mind that the consolidation order in the current 'case was yet to be perfected, "by suitable use of the powers conferred" under O. 15 r. 5, I was thus not prevented from modifying the order. I further seek solace from the case of *Kok Wee Kiat (Mrs) v. Kuala Lumpur Stock Exchange Bhd & Ors*. [1977] 1 MLJ 109 which

highlights this point. In this case the learned trial judge had directed that the distinct course of actions against the first respondent be tried first separately. Being dissatisfied with this order, the appellant appealed, but failed at the Federal Court level. Ali FJ, when discussing O. 18 r. 1 (in *pari materia* with O.15 r. 5 of the Rules of the High Court 1980) there opined:

> The learned Judge has very wide powers under the Rules to make the Order which is nothing more than a direction that the trial of the action be conducted in a particular manner. As the learned judge will no doubt be hearing the action himself I do not think it is right or proper for this court to order that the trial be conducted in a manner different from what the learned judge has directed. Indeed, I do not think the appellant has any valid ground to appeal. I would dismiss it.

Even though case laws do recognise the rights of judges to modify orders, I was more partisan towards the first alternative ground for purposes of encl. 47. This was so as the current application (encl. 47) did not intend to see the consolidation order modified but to have it set aside completely. The effect of a setting aside order was that, *status quo* would remain. The separate trial of each action also remained intact.

To wind up the matter, my course of action was an act of recalling and reopening the matter, and thereafter setting aside that earlier order. This was possible as:

1. the order of consolidation of 8 July 1998 was yet to be perfected;
2. a better understanding of the situation showed that each case had different problems involving different issues and differing questions of law. The consolidation would embarrass or delay the trial, or otherwise would create inconvenience to all parties, including the court; and
3. it was desirable in the name of justice that the cases be tried separately.